United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1025

To be argued by
JACOB LAUFER

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1025

UNITED STATES OF AMERICA,
Appellee,

—v.—

JOSEPH ANTHONY PELOSE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Joseph Anthony Pelose appeals from a judgment of conviction entered on January 8, 1976, in the United States District Court for the Southern District of New York, after a six day trial before the Honorable Thomas P. Griesa, United States District Judge, and a jury.

Information 75 Cr. 266, filed on March 14, 1975, charged Pelose in nine counts with having wilfully failed to file tax returns on behalf of three corporations of which he was principal owner and President, in violation of Title 26, United States Code, Section 7203.

The trial began on November 3, 1975, and concluded on November 12, 1975 when the jury convicted Pelose of all nine counts.

On January 8, 1976, Judge Griesa sentenced Pelose to concurrent terms of one year's imprisonment on each of Counts One through Nine, and to a $5,000 committed fine on each Count.

Pelose remains free on a $10,000 personal recognizance bond pending disposition of this appeal.

Statement of Facts

The Government's Case

The proof at trial established that Pelose was the President and principal owner of three corporations: Jeath, Inc., which had been incorporated in August, 1963; Saw Mill Truck Rental, Inc., incorporated in November, 1964; and the H.V. Development Corporation, incorporated in August, 1966 (Tr. 83-87, 94; GX 1-3).* During the nine corporate years in which Pelose wilfully failed to file corporate income tax returns, the stipulated gross receipts of these corporations was in excess of $1,600,000.00.** Pelose's control over these corporations was conceded by Ferdinand Goglio, his representative, at several meetings with Internal Revenue Service employees, during 1973 and 1974 (Tr. 252-53, 266-67).

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* Parenthetical references prefixed "Tr." are to pages of the trial transcript; and to "GX" are to Government Exhibits.

** The parties stipulated that during the years charged in the Information, the gross receipts of the several corporations were as follows: *Jeath, Inc.*, $200,315.56 (fiscal year ended ("fye") July 31, 1969); $299,157.41 (fye July 31, 1970); and $342,567.53 (fye July 31, 1971); *Saw Mill Truck Rental, Inc.*, $120,045.98 (calendar year ("cy") 1968); and $75,838.84 (cy 1969); and *H.V. Development Corporation*, $73,843.00 (cy 1968); $181,610.35 (cy 1969); $154,620.15 (cy 1970); and $196,426.00 (cy 1971). (Tr. 89-90, 301-02; GX 42).

Pelose had employed Walter Cole, a Certified Public Accountant, as the retained accountant for himself and various scrap steel businesses which he headed from the latter 1940's up until about 1960, during which period all personal and corporate tax returns were timely filed (Tr. 41-42). This retainer relationship was resumed in April or May, 1967, at Pelose's initiative, at which time Pelose advised Cole that he was the principal of the three relevant corporations (Tr. 43-44), and that the three corporations' income tax returns had not been filed. (Tr. 58-60). Cole continued to serve Pelose in this capacity until April, 1975. (Tr. 46).

While Cole prepared various employee, sales and personal income tax returns during this eight year period (Tr. 46), he was unable to prepare federal corporation income tax returns on behalf of the subject corporations both because the bookkeeping was inadequate for him to derive reliable information and because his reviews of the cancelled checks of the three corporations disclosed large numbers of checks payable to "cash" or to Pelose himself, and for which checks he was unable to obtain explanations from Pelose (Tr. 47, 216-19, 231). These checks, for the calendar years 1968-71, totalled some $429,000. (Tr. 392; GX 43).

Cole attempted to remedy the bookkeeping problem by training the bookkeeper, Pelose's daughter Debby, but his efforts were to no avail, as were his requests that Pelose rectify the problem (Tr. 53-57, 62, 70, 106-08). In an attempt to receive an explanation of the purposes of the checks to cash and to Pelose, he made telephone calls, and sent six letters reminding Pelose that tax returns were overdue and that the returns could not be prepared without adequate bookkeeping and explanations for the checks (Tr. 47-53, 108-09; GX 20-25).

The Internal Revenue Service made similar, periodic demands of Pelose, and on five occasions sent him notices demanding overdue corporate tax returns (Tr. 64-66, 68-71; GX 26-30).

During this period when Pelose declined to take the steps necessary for filing the tax returns, he actively provided information to enable Cole to prepare at least nine bank loan documents to support loans which a Chemical Bank Branch in the Bronx had extended to the three corporations. (Tr. 71-74, 98-100, 116-17, 119-22; GX 31-38; Defendant's Exhibit S). Cole's reluctance to prepare these documents, given the inadequate bookkeeping of the corporations, was overcome by Pelose's importuning him and by their many years of friendship. (Tr. 221). Accordingly, Cole submitted the forms to the bank, alerting the bank to the unreliability of his source information (Tr. 115, 222), *i.e.*, unverified information given him by Pelose (Tr. 97-100, 116-17, 119-22). The first of these statements was returned to Cole by the bank manager with a request that he amend the qualifications concerning the unreliability of the source information. Cole complied. (Tr. 221-22, 200-02, 213-14).*

A prior accountant, Harold Parker, had been hired to work for Jeath, Inc., by Pelose, in January, 1964, and continued into January, 1967, preparing corporate tax returns for fiscal years ended 1964,** 1965 and 1966. (Tr. 288-89). His first record of having performed work for Saw Mill Truck Rental, Inc., was in August of 1965. (Tr. 292). He did not prepare tax returns on behalf of

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* While under usual circumstances, information from such a form could be transposed onto a Federal Corporation Income Tax Return, Cole refused to do so because of his actual knowledge of the qualified, and unreliable, nature of the figures on the bank loan forms. (Tr. 234-36).

** Pelose did not file the 1964 tax return. (GX 4, 45).

Saw Mill because he had difficulties both in receiving timely information from Pelose and in collecting his fees. (Tr. 293-94, 297-98). He also prepared no tax returns on behalf of H.V. Development Corporation. (Tr. 294).

The Government introduced, on the issue of intent, the following record of Pelose's filing history with respect to the three subject corporations:

1. *Jeath, Inc.* No returns were filed for 1963 and 1964; the returns for fiscal years ending 1965 and 1966 were filed late; no returns were filed for the fiscal years ending 1967-1971; the returns for calendar years 1972-1974 were all filed late—in October, 1975. (GX 4-9, 45).

2. *Saw Mill Truck Rental, Inc.* No returns were filed for calendar years 1964-1971; the returns for calendar years 1972-1974 were all filed late—in October, 1975. (GX 10-14, 45).

3. *H.V. Development Corporation.* No returns were filed for calendar years 1966-1971; the return for calendar year 1974 was filed late—in September, 1975. (GX 15, 18, 45).

The Defendant's Case

Norge Bertolli, a Certified Public Accountant, identified nine Federal Corporation Income Tax Return Forms of the three subject corporations, corresponding to the Counts charged in the Information. (Tr. 306-08). He had been retained by Pelose after the criminal tax investigation had begun, (Tr. 318), and in late 1974 and 1975, was able to prepare these forms from information contained in the corporate records. (Tr. 306-08). The forms, on advice of counsel, were never filed with the Internal Revenue Service (Tr. 317-18), nor were they ever signed. (Tr. 318). He conceded that these "tax

return" forms could not properly be prepared without the taxpayer's explanation of cancelled checks, (Tr. 321-22, 348-49), but then stated variously that (a) to his personal knowledge Pelose was never questioned about the checks prior to the preparation of these forms (Tr. 349-50, 353-54, 428); (b) checks to "cash" or to Pelose were treated as personal income * (Tr. 354, 360-61); (c) checks in this category represented intercorporate transfers of funds ** (Tr. 380-81); (d) explanations of several checks were gotten from Pelose, (Tr. 416, 423-24, 426); and (e) certain checks were never accounted for (Tr. 417, 425). Bertolli stated that had he been Pelose's accountant, he would have requested an extension of time for filing the returns. (Tr. 316, 360).

Debby Pelose, Pelose's daughter, testified that Pelose had a disc removed from his back some time in 1966, and that some time prior to his having cobalt treatments she was present at a meeting wherein Cole assured Pelose that he would file for extension of the due date of tax returns (Tr. 435-36), and to a conversation with Cole while Pelose was hospitalized wherein Cole assured her that applications had been filed with the IRS requesting extensions. (Tr. 436). She testified that she opened the mail at the corporate offices but denied having ever seen letters which Cole testified he had sent Pelose (Tr. 437), and stated she had, in 1971, brought to Cole's attention a demand letter from the Internal Revenue Service and that he had once again assured her that he would take care of everything. (Tr. 438-39).

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* This despite the fact that during 1968-71, Pelose reported $200,000 in personal income, (Tr. 334-36, 378-79), whereas the checks in this category totalled some $429,000 for the same period. (GX 43; Tr. 392).

** This despite the fact that none of the checks in Government Exhibit 43 contained the characteristics of a corporate transfer. (Tr. 408-12).

On cross-examination, she conceded that the letters, save one, were addressed to Pelose's personal home rather than to the business. (Tr. 441, 443). She testified that she had never had any formal training in bookkeeping and was unable, when questioned, to answer several simple questions involving bookkeeping entries. (Tr. 441-43).

Sidney H. Leeds, a professor of accounting, stated that Cole's submission to the bank of the loan forms, without fully stating the qualifications upon his audit, did not comport with proper accounting practices (Tr. 451-52). With such a form before him, he could complete a corporate income tax return (Tr. 451), but he would not advocate an accountant to prepare an income tax return based on information he knew to be insufficient or false (Tr. 461-62). He stated that an extension of time to file a return should be sought when a taxpayer is ill (Tr. 453).

Dr. Edwin I. Cleveland testified that Pelose's medical records reflected a back injury in 1966 (Tr. 468), which required surgery in 1967 (Tr. 469). He detected carcinoma of the vocal cord in April, 1968. He commenced cobalt treatments, which, while inducing malaise (Tr. 470), do not preclude one from carrying on his business (Tr. 477). A laryngectomy was performed in September, 1968 (Tr. 473), which left Pelose without speech for some three months (Tr. 479-80). A further surgical procedure was required some time in 1970 (Tr. 474). Cleveland continued to see Pelose regularly, through the date of his testimony at trial, and described an incident in February, 1975, in which Pelose coughed up blood. (Tr. 475-76).

The Government's Rebuttal Case

In order to rebut Pelose's defense of physical disability during the tax years charged in the Information and thereafter, the Government proved that Pelose was in mid-town Manhattan, attending to the business of the corporations on 37 specific occasions from January, 1968 through March, 1970 (Tr. 501-02); that only months after his laryngectomy, Pelose attended a business meeting in Buffalo, New York (Tr. 494-95); and that, again, shortly after the surgery, Pelose attended a business meeting in North Bergen, New Jersey. (Tr. 509).

ARGUMENT

The Court's charge was legally correct, and did not prejudicially amend the information.

Pelose argues that Title 26, United States Code, Section 7203, which makes it a crime to wilfully fail to make a tax return "at the time or times required by law or regulations" can be violated only on the very first day the return is due, and that, therefore, the Court's charge to the jury that his failure to make a return might have become a wilful violation at some later point in time misstated the law. Pelose further contends that the Court's instruction in effect worked as prejudicial amendment of the information. Both of these contentions lack merit.

A. The Court's charge correctly stated the law.

An essential element of a Section 7203 violation is proof of "wilfulness." This element connotes "a voluntary intentional violation of a known legal duty," and requires proof, whether direct or circumstantial of "bad faith or

evil intent." *United States* v. *Bishop*, 412 U.S. 346, 360 (1973); *United States* v. *Murdock*, 290 U.S. 389, 398 (1933). Evidence of wilfullness is required in order to separate the deliberate and calculating tax violator from the mass of well intentioned, but confused, taxpayers. *United States* v. *Bishop*, *supra*, 412 U.S. at 361.

In the instant case, each of the federal corporate income tax returns which the defendant failed to file first became due two and a half months after the completion of the tax years to which they related. The Court charged the jury that, while the defendant's failure to file might not have been wilful on the original due date, the failure to file might be found to have become wilful at a later date:

> "Now let me say a word about a subject which I will speak of as the time factor. As I said earlier, the particular tax returns in question were due two and a half months after the completion of the years which they related to. The earliest due dates were for the 1968 returns of Saw Mill and H.V. Development referred to in counts 4 and 6. These returns were due by March 15, 1969. Other returns referred to in other counts were due at various later times. The last of the due dates was for the 1971 return of H.V. Development, referred to in count 9. This return was due by March 15, 1972.
>
> As you know, none of these returns have ever been filed. The information in this case was filed March 14, 1975. That is, the criminal action was commenced March 14, 1975.
>
> The point I wish to make to you now is this. Let us suppose for purposes of illustration that because of the circumstances of illness, reliance on the accountant or because of some other reason

you find that the government has failed to prove that Pelose had the requisite wilfulness back in 1969 and 1970 because perhaps he believed that Cole had obtained extensions. I am not saying that you should find this or not find this; I am simply trying to illustrate a point.

Let us further suppose for purposes of illustration that you find that by a certain time later he was—by 'he' I mean Pelose—sufficiently recovered from his illness to handle business affairs, and because of a notice from the IRS or the institution of an investigation by the IRS, or for some other reason, he was at this later time no longer relying on Cole for having obtained extensions and knew that such extensions had not been obtained. Again I repeat that I am not saying that this is what you should find or not find. I am trying to illustrate a point which I think will become clear.

The point is, if you should find in the course of your deliberations that at such later time Pelose wilfully failed to file past returns after learning of the deficiency and the lack of extensions and failed to file the current returns due in 1972 or thereafter, then he would be guilty of wilful failure to file these returns, if you found the wilfulness existent at such later time under circumstances of the kind I have mentioned to you." (Tr. 616-18).

Pelose argues that this charge was erroneous because Section 7203 does not impose a continuing duty to file corporate income tax returns, and therefore, if Pelose's failure to file on the original due date was not wilful (because of illness or mistaken reliance on his accountant) he cannot be found to have violated the statute even if he later became aware of his obligations and purposely neglected to fulfill them. Pelose's claim ascribes to Con-

gress an intent which is utterly preposterous and overlooks case law in direct conflict.

The total illogic of Pelose's claim can be illustrated with a simple example. Suppose a closely held corporation's tax year ends on December 31st and its tax return must be filed by March 15th. Suppose, further, that the President of the corporation is under severe mental stress due to the serious illness of his child from January 1st until March 15th and genuinely forgets to file the corporate return. When reminded on March 16th of his failure to file by an associate, the defendant deliberately decides not to prepare a return, and then does not do so. Under the construct advanced by Pelose, the President would be immune from a Section 7203 prosecution, because his "wilful" failure to file did not commence until after the return was due to be filed and there is no "continuing" obligation to file.

One would expect that, before such a bizarre interpretation would be attributed to Congress, the interpretation would find some support in the language of the statute. Here, there is none. Section 7203 makes it a crime to wilfully fail to make a return "at the time or times required by law or regulations." Section 6072(b) of Title 26 and Section 1.6072-2 of the Federal Income Tax Regulations provide that corporations shall file tax returns on or before the fifteenth day of the third month following the close of the taxable year. But a failure to promptly file in no way excuses the obligation to file a return. Section 6651 of Title 26, United States Code, provides that

> "In case of failure to file any return . . . on the date prescribed therefore . . . unless it is shown that such failure is due to reasonable cause and not due to wilful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is not

> for more than 1 month, with an addition 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate."

Moreover, regular interest payments are assessed on late tax returns upon notice and demand. 26 U.S.C. § 6601 (a) (f). The fact that the imposition of penalties and interest is a function of the time it takes to file a late return conclusively demonstrates that the obligation to file returns continues after the required due date. *Cf. Capone* v. *United States*, 51 F.2d 609, 617-18 (7th Cir.), *cert. denied*, 284 U.S. 669 (1931).

Moreover, the relevant case law completely undermines Pelose's specious contention. In *Capone* v. *United States*, *supra*, the Seventh Circuit, in interpreting the predecessor of Section 7203, which is in all relevant respects identical, *id.* at 612-13 n.1, was confronted with a claim that the then extant three year general statute of limitations had lapsed on charges that Capone had wilfully failed to pay income taxes in preceding years. The Court found that since wilfullness was an essential element of the crime, the offense was not complete and the statute of limitations did not begin to run until Capone's omission became wilful, "a material issue for the jury to determine." *Id.* at 617. The Court concluded:

> "We see no escape from the latter reasoning. True, the statute limits the words 'who wilfully fails to pay such tax' by the clause 'at the time or times required by law or regulations. . .' This limitation, however, does not mean that one cannot offend against this section unless his refusal to pay is willful on March 15 of the year succeeding the earning of the income. *We think the only rational construction that can possibly be placed upon the words, 'at the time or times required by*

> *law or regulations,' includes all dates subsequent to the earliest date at which such tax is due and payable and continues so long as the tax is unpaid and remains due and payable. It would be absurd and ridiculous to hold that a taxpayer might avoid conviction under this section if his failure to pay were willful on al ys save March 15 of the year succeeding the year the income or gain was received. Congress never intended such an effect to be given to its language.* It intended that the failure to pay a tax could become willful at any date or dates the tax was made payable. It was due as much the day after March 15 as it was on March 15." *Id.* at 617 (emphasis supplied).

Similarly, in *Arnold* v. *United States*, 75 F.2d 144 (9th Cir. 1935), the Court was faced with circumstances which closely resemble the present case. The indictment, tracking the appropriate statutory language, stated that the defendant's income tax return was due on or before March 15, 1931, and charged that "between the close of the calendar year of 1930, and the 15th day of March, 1931, the defendant wilfully failed to make the return, and that on the 15th of March, 1931, he wilfully failed and refused to make the return required by law." *Id.* at 144. The indictment in *Arnold* had been returned on March 30, 1934, fifteen days after the three year statute of limitations had nominally run. The District Court charged the jury that since the obligation to file was a continuing one, it could convict Arnold if it found that his wilfullness occurred within three years prior to the filing of the indictment. The District Court's analysis of the obligation as continuing was approved by the Circuit Court, which quoted with approval from the opinion in *Capone* v. *United States*, *supra*. 75 F.2d at 145-46.

More recently, the Ninth Circuit in *United States* v. *Andros*, 484 F.2d 531, 532-33 (1974), found that an

offense charged under Section 7203 could be committed after the first date on which the obligation to pay a tax initially attached. The Court in *Andros*, relying on both *Capone* v. *United States*, *supra*, and *Arnold* v. *United States*, *supra*, held that the offense was committed only when the failure to pay became wilful.

The heavy reliance which Pelose places on *Toussie* v. *United States*, 397 U.S. 112 (1970), is entirely misplaced. In *Toussie*, the defendant had been convicted of a failure to register for the draft. The Supreme Court, in reversing the defendant's conviction, held that, while the Selective Service Act imposed a continuing duty to register from five days after the defendant's eighteenth birthday until five days past his twenty-sixth birthday, the crime of failure to register was complete five days after the defendant's eighteenth birthday and the statute of limitations began to run from that date, not eight years later as the Government had argued. Since Toussie had not been indicted until almost eight years after his obligation to register first arose, his conviction was held to be barred by the five year statute of limitations.

Toussie is of no assistance to Pelose for two reasons. First, the Supreme Court was careful to note that it was not invalidating the continuing duty to register. 397 U.S. at 121 n.17. Rather, it was simply holding that this continuing duty could not be construed to vary the Congressionally declared policy of barring prosecution for the offense within five years after it was first committed. See *United States* v. *Owens*, 431 F.2d 349, 351 (5th Cir. 1970). The Court in no way indicated that a defendant could not violate the Selective Service Law by intentionally failing to register at a time after his eighteenth birthday, plus 5 days. Thus, for example, there would be no impediment to a charge that on a defendant's twenty-second birthday he received a notice of his obligation to register, read it, and then tore it up. This

fact has clearly been recognized by Courts of Appeals since *Toussie*. *United States* v. *Harmon*, 486 F.2d 363, 365-66 (10th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974); *United States* v. *Abrams*, 476 F.2d 1067, 1070-71 (7th Cir. 1973), *cert. denied*, 414 U.S. 1001 (1974); *United States* v. *Bruckman*, 466 F.2d 754, 756-57 (7th Cir. 1972); *United States* v. *Williams*, 433 F.2d 1305, 1306 (9th Cir. 1970); *United States* v. *Owens*, 431 F.2d 349 (5th Cir. 1970); *cf.*, *United States* v. *Sloan*, 389 F. Supp. 526 (S.D.N.Y. 1975). *But see United States* v. *Crocker*, 435 F.2d 601, 603-04 (8th Cir. 1971). Since, here, Pelose was prosecuted for failure to file within the earliest applicable period of limitations, *Toussie* provides no support for Pelose's position.*

Secondly, in *Toussie* the Government had never contended that the defendant's failure to register five days after his eighteenth birthday was not then a completed crime. No assertion was made, for example, that it was not until three years after the defendant first failed to register that his failure first became knowing and wilful, *i.e.*, that all of the elements of the crime first coalesced at a later point in time within five years of the prosecution. Since Toussie's crime was complete five days after his eighteenth birthday (there being no contention to the contrary), and was held not to be a "continuing crime," the applicable statute of limitations, which commenced from the date the crime was "committed," 18 U.S.C. § 3282, had run by the time the Government had returned its indictment. However, in the instant case, wilfullness, as previously discussed, was an element of the crime that

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* The information in the present case was filed on March 14, 1975 (Appendix at 2), within the six year limitations period of the earliest charged crime, and indeed, this is a fact which the Court twice made known to the jury during that very portion of the charge which Pelose now claims prejudiced him. (Appendix at 48; see p. 9, *supra*).

may not have existed on the date any given tax return was first due. In that circumstance, the crime would not have been "committed" until the defendant's failure to file became wilful. The Court's instruction, in this regard, was not that the crime was a "continuing" one, but rather that it could only have been first "committed" at that point in time when the jury found wilfullness to have coalesced with the failure to file. *United States* v. *Andros*, *supra*, 484 F.2d at 532-33; *United States* v. *Bruckman*, *supra*, 466 F.2d at 756-58; *United States* v. *Owens*, *supra*, 431 F.2d at 350-52. This, we submit, was an eminently fair and proper charge.

B. The Court's charge did not prejudicially amend the information.

Pelose's second claim is that Judge Griesa's charge effected a prejudicial amendment of the charges on which he stood trial. Specifically, he claims that, since each count in the Information charged that the defendant wilfully failed to file a corporate income tax return within 2½ months of the close of the relevant fiscal year, as required by law, the Judge's charge, which permitted the jury to find that the criminal violation arose at a later time when the failure to file first became wilful, "materially changed the theory of the prosecution." (Br. at 12). This was prejudicial, Pelose claims because the amendment "prevented him from mounting a proper defense to an allegation he never knew had been made against him." (Br. at 13). This claim is utterly frivolous.

First, it has long been recognized that, when a continuing obligation exists to remedy an omission which, together with an unlawful intent, amounts to a criminal violation, it is permissible to charge in the accusatory instrument that the offense occurred on the first date of the omission, notwithstanding the fact that proof is ad-

duced which may lead the jury to conclude that the unlawful intent did not arise until a later time. *Silverman* v. *United States*, 220 F.2d 36, 39 (8th Cir. 1955);* *United States* v. *Bruckman*, *supra*, 466 F.2d at 757-58; *United States* v. *Preston*, 420 F.2d 60, 61-62 (5th Cir. 1970); *cf. United States* v. *DeNarvaez*, 407 F.2d 185 (2d Cir.), *cert. denied*, 396 U.S. 822 (1969). Thus the Court's charge was entirely correct, and effected no amendment of the information.

Moreover, even assuming *arguendo* that the Court's instruction constructively amended the Information, this was plainly permissible, as Pelose recognizes (Br. at 13), under Fed. R. Crim. P. 7(e), so long as the amendment did not prejudice any substantial rights of the defendant. Here, no prejudice occurred.

The claim that the Judge's charge reflected a novel theory of prosecution which came as a complete "surprise" to trial counsel is completely belied by the record. In this regard, we note first that experienced trial counsel never suggested below that the Judge's charge effected a prejudicial amendment.** Not only is this failure to

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* In *Silverman*, the indictment charged the defendant with having failed to report for induction into the armed services on June 6, 1951. The Court held that the jury was properly instructed that, while the indictment charged the defendant with an offense on that specific date, the duty to report was a continuing one, and that the defendant could be convicted if the jury found that the defendant had wilfully failed to report at any time between that date and the return of the indictment. 220 F.2d at 38-39.

** To be sure, after the Judge's charge (to which defense counsel had been given a preview which he found unobjectionable, (see pp. 22-23, *infra*), counsel stated "I respectfully take exception to the Court's statement under the time example which amounts to a directed verdict of guilty, I most respectfully

[Footnote continued on following page]

claim surprise or prejudice—either through a proper objection or a motion for a mistrial—strong evidence of the fact that the Judge's charge in no way came as the startling revelation it is now claimed to have been, but it is also a waiver of any claim. *United States* v. *Goldberg*, 527 F.2d 165, 170-71 (2d Cir. 1975); *see United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). The defendant ought not be permitted to withhold a claim of prejudice from the trial judge, take his chances with the jury, and then seek reversal on the very grounds upon which he withheld any objection. *See United States* v. *Estremera*, Dkt.

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submit." (Tr. 624). This rather unspecific objection, which seems to have only been directed at the Judge's phraseology, did not preserve for appeal any issue concerning an impermissible amendment—a subject not even touched upon by the objection. Rule 30 of the Federal Rules of Criminal Procedure states that "No party may assign as error any portion of the charge . . . unless he objects thereto . . . *stating distinctly* the matter to which he objects and *the grounds of his objection.*" (emphasis supplied); *United States* v. *Goldberg*, 527 F.2d 165, 170-71 (2d Cir. 1975); *United States* v. *Phillips*, 522 F.2d 388, 391 (8th Cir. 1975); *United States* v. *Williams*, 521 F.2d 950, 955-56 (D.C. Cir. 1975); *United States* v. *Pinto*, 503 F.2d 718, 723-24 (2d Cir. 1974); *United States* v. *Carson*, 464 F.2d 424, 432 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972); *see United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). Furthermore, counsel's initial acquiescence in, and indeed implied adoption of the precise charge complained of at an earlier point in the trial (see pp. 22-23, *infra*) is both probative of his lack of surprise, and resulted in a waiver of the issue on appeal, even if this Court were to find his later objection adequately stated the grounds therefor. *United States* v. *Malcolm*, 475 F.2d 420, 428 (9th Cir. 1973). Nor did defense counsel, having been alerted to the law earlier in the trial, (see pp. 19-20, *infra*), move for a continuance in the face of this "surprising" development. *United States* v. *Pineros*, Dkt. No. 75-1354, slip op. 2855, 2861 (2d Cir. March 29, 1976). This failure, in addition to negating Pelose's current assertion of "surprise," is fatal to Pelose's claim. *See United States* v. *Andrews*, 381 F.2d 377, 378 (2d Cir. 1967), *cert. denied*, 390 U.S. 960 (1968).

No. 75-1261, slip op. 1693, 1705-06 (2d Cir. February 2, 1976); *cf. Ladakis* v. *United States*, 283 F.2d 141, 143 (10th Cir. 1960); *United States* v. *Calles*, 482 F.2d 1155, 1162 (5th Cir. 1973); *Remus* v. *United States*, 291 F.2d 501, 510 (6th Cir. 1923), *cert. denied*, 263 U.S. 717 (1924).

Second, there is abundant evidence that Pelose and his attorney fully understood the theory of the prosecution to be that the obligation to file tax returns was a continuing one which did not lapse if the failure to file was non-wilful from the end of the fiscal year to a date 2½ months later. The theory of the defense, throughout the trial, was that Pelose's failure to file had not been wilful and that his omissions were attributable to illness and mistaken reliance on his accountant, Walter Cole. In pressing this defense, counsel never sought to limit his proof of illness or reliance to those two and a half month periods between the end of the fiscal year and the due date for corporate returns. Indeed, the last return charged in the Information became due on March 15, 1972, yet counsel sought to prove through the testimony of Dr. Cleveland that, as a result of a total laryngectomy in September, 1968, Pelose continued to suffer from physical disabilities and that as late as February, 1975, just one month before the filing of the Information, the defendant, who had never filed the returns in issue, suffered from bleeding of the lungs. (Tr. 473-76).

Nor can it be argued that the Court did not alert counsel to the fact that it saw before it no viable justification for Pelose's continued failure to file the returns in the ensuing years. Judge Griesa, for example, stated:

> "But I want to go back. Whichever way this line of inquiry turns out, I am mystified as to the nature of the defense. This taxpayer, let us suppose that he relied on his accountant, Cole, back

at an early stage. Let us suppose he was too ill to focus on the matter. Let us suppose all these things and let us suppose that the jury could find that there was no wilful failure to file back in 1969 or 1970 or even 1971. What about 1972, 1973, 1974?"

Mr. La Rossa: They are not before the jury.

The Court: The years, the time. In other words, if I am ill or if I rely on an accountant and he does not file my returns, and I can't focus on it, when I get well and when I realize and I am told by the Internal Revenue Service, "You have not filed your returns," then if I still refuse to file them, is that not wilful negligence?

Mr. La Rossa: I think that comes awfully close to it, if it is as you describe it, it is an absolute refusal to file his tax returns, certainly.

The Court: After you get well—you have the Fifth Amendment privilege for your client——

Mr. La Rossa: Judge, I think if you have a little more patience for the rest of the day, you will see it.

The Court: If there is an answer to that, then—what I am getting at, there either is an answer to the question I have last posed or there is not, and if there is, I don't really much see—I guess what I am getting around to, I don't much see the need for endlessly going into this Bertolli preparation of those returns. I keep waiting for something to clear me up about what the defense is in this case." (Tr. 400-01) (See also, Tr. 232-34, 397).

It was shortly after this colloquy that defense counsel made clear to the Court what the nature of its defense for 1972-74 would be: Dr. Cleveland was called to testify

to the defendant's continuing physical disabilities up to and including February, 1975. (Tr. 475-76).

Moreover, the defendant's reliance on this medical testimony as a defense insofar as it concerned years when the returns were already long overdue is illustrated by a portion of defense counsel's summation:

> "So listen to the words. Count 1, I am not reading the whole thing. I am going to skip around. That Mr. Pelose was a principal of a corporation. I don't think there is much doubt about that.
>
> That the corporation had gross receipts? I don't think there is any doubt about that. Those two things already were stipulated.
>
> That no tax return was filed for that particular year? Very little doubt about that. There wasn't one. But in all these things, the information goes on to say, that he well knowing all of the foregoing facts, Pelose, he did unlawfully, wilfully and knowingly fail to make said return. Not accidentally, not unintentionally, not depending upon Mr. Cole, none of those things. Not assuming Mr. Cole filed the application for an extension.
>
> All those things are taken out of this. You can't look into his mind, you can't read it. We can't open it up. But you have to assume that during this period, and I am just going to read a few things to you in paraphrase, one little bit of testimony, that during this period Joseph Pelose said to himself "I am unlawfully, wilfully and knowingly failing to file my corporate tax returns, during the period when an automobile accident occurs at the end of 1966," he goes into traction on more than one occasion in 1967, he has vertebrae removed from his back in 1967, to the hoarse

> voice beginning in 1968 to 30 treatments of cobalt, to the operation on his throat which removes almost every viable organ in his throat, to the many visits that he makes to the doctor to learn how to do simple things, like breathe and eat, to a school down town in Manhattan which teaches him how to make burping sounds or utterances, to a second operation, a laryngostomy, they call it, *because the hole was too small, to blood in his lungs at the beginning of 1975, that during that period when he is trying his best to keep these corporations viable, he purposely, intentionally and wilfully violates these criminal sections. That's what you must determine.*" (Tr. 585-86) (emphasis supplied).

Perhaps the most telling point proving that Pelose did not at the time of trial regard the portion of the charge of which he presently complains as an "amendment" of the information is the fact that the Court, in its review with counsel of its proposed charges to the jury, prior to the summations, stated that it would give that precise instruction:

> "I think that I ought to further instruct them that in a given case it may be possible for a taxpayer or a corporate officer, because of illness or because of a belief that an accountant is filing or is getting extensions, it may be possible for such a taxpayer or corporate officer to not have any wilful, unlawful intent, to be lacking in such intent because of the illness or reliance on the accountant for a period of time.
>
> If the jury believes that the Government has proved that at a certain point in time the illness loses its effect in negating the guilty state of mind, if the reliance on the accountant is over with, then

> if the jury finds that thereafter there was a wilful failure to file at any time before the filing of the information, that would constitute wilfulness under the statute, provided the jury found wilfulness at that later time, as I have defined it." (Tr. 525).

Not only did Pelose not affirmatively object to the proposed instruction as varying from his understanding of the charged offenses, but he impliedly adopted it:

> "Mr. La Rossa: Your Honor has said that in determining wilfulness, whether or not the defendant Pelose had the requisite wilful intent after describing what it is, you may take into consideration all the factors in the case, including the illness and the length of illness, whether or not he was capable of physically attending to his duties after a certain specific time, the fact that there has been evidence introduced that indicated that the accountant was retained to prepare these tax returns and whether or not he relied upon that delegation, the fact that there has been evidence in this case that the defendant was informed that applications for extensions of time were applied for, even though in fact they were not, and on and on.
>
> The way your Honor was doing it before, if we are going to do it at all, I think it should be done in that type of fashion." (Tr. 528-29).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Jane Dobson being duly sworn. deposes and says that he is employed in the office of the Strike Force for the Southern District of New York.

That on the 15th day of April, 1976, he served two copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

PATRICK M. WALL, ESQ.
WALL & BECK
36 West 44th Street
New York, New York 10036

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Jane H Dobson

Sworn to before me this
15th day of April, 1976

Jacob Laufer

JACOB LAUFER
Notary Public, State of New York
No. 24-4609171
Qualified in Kings County
Commission Expires March 30, 1977